

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

MDL No. 1456

C.A. No.: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO
ALL CLASS ACTIONS

Judge Patti B. Saris

**WATSON PHARMACEUTICALS, INC.'S RESPONSE TO CLASS
PLAINTIFFS' RESPONSE TO AMGEN AND WATSON'S
SUPPLEMENTAL OPPOSITION TO CLASS CERTIFICATION**

Exhibit 7: Excerpts from Deposition of Thomas M. Scully
(May 15, 2007).

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456

INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION

PRICE LITIGATION : 01-CV-12257-PBS

THIS DOCUMENT RELATES TO :

U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris

the Florida Keys, Inc. :

v. :

Abbott Laboratories, Inc., : Chief Magistrate

No. 06-CV-11337-PBS : Judge Marianne B.

- - - - -x Bowler

1 Videotaped Deposition of THOMAS A.
2 SCULLY, a witness herein, called for examination by
3 counsel for Abbott Laboratories in the above-entitled
4 matter, pursuant to subpoena, the witness being duly
5 sworn by SUSAN L. CIMINELLI, a Notary Public in and
6 for the District of Columbia, taken at the offices of
7 Jones Day, 51 Louisiana Avenue, Northwest,
8 Washington, D.C., at 8:49 a.m. on Tuesday, May 15,
9 2007, and the proceedings being taken down by
10 Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and
11 transcribed under her direction.

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1 million, is that correct?

2 A. You could have a very rational policy
3 debate about what the appropriate level was, but I
4 would say the 5 to 600 million clearly represented --
5 a large chunk of that was politics.

6 Q. And so that we are clear, what we are
7 talking about is that under the MMA, when it went
8 into effect, drug reimbursement was reduced by a
9 certain amount, and at the same time, service fees to
10 providers were increased, correct?

11 A. Yes.

12 Q. And the increase on the service fees to
13 providers was in the range of 500 to \$600 million?

14 MR. GOBENA: Object to the form.

15 BY MR. DALY:

16 Q. Is that right?

17 MR. GOBENA: Mischaracterizes the
18 witness's testimony.

19 THE WITNESS: Yes. In the RUC, or in the
20 normal process of roughly \$70 million of Part B
21 payments, if you're going to raise oncologists, you
22 have to cut somebody else. It's a budget neutral

1 pot, so what Congress did in this debate was they
2 significantly reduced AWP for drugs for oncology and
3 they took some of that money, I think it was roughly
4 a billion a year in savings, put some of the money,
5 put it back into a nonbudget neutral add-on just for
6 mostly oncologists, some of it was rheumatology,
7 there was probably four -- there were other practice
8 areas that were affected as well -- back in to
9 restore some of their revenues.

10 But it was probably some of that was a
11 political push because obviously the bill was
12 controversial for totally other reasons. And
13 Congress, with an intense group of opposition from
14 lawyers and oncologists, this was a controversial
15 issue. This was a side show for the Medicare Part B
16 prescription drug bill, but we were able to pass both
17 bills by one vote in both houses of Congress, got
18 very contentious and so the loud group of screaming
19 people about this particular provision theoretically
20 could have held up the whole bill. So we added back
21 in more than I think most people thought was
22 justified in the end.

1 You could pick a number anywhere from 50
2 million up to probably 600 and justify it, but the
3 savings, the total savings was over a billion I think
4 in the first year. And on the other side, dialysis,
5 Congress very consciously, because dialysis really
6 did have bad margins, whereas I would argue
7 oncologists did not, or rheumatologists, dollar for
8 dollar, Congress instructed the agency from AWP
9 savings on dialysis dollar for dollar every dollar
10 that came out went back into a drug add-on. Dollar
11 for dollar, there were no savings. There were they
12 conscious savings on the oncology side.

13 So Congress clearly had the intention of
14 saving a lot of money on drugs which I would -- not
15 even an argument. It was clear that there was a
16 massive overspending on drugs versus any arguable
17 underpayment for services in oncology.

18 In dialysis, I would say the argument
19 wasn't made as thoroughly, but in dialysis we made
20 conscious -- or Congress, Chairman Thomas and
21 Grassley and Baucus made a conscious decision to take
22 every dollar out and put it back in, so dialysis --

1 because dialysis had very low to no Medicare margins,
2 whereas I don't believe it was as credible an
3 argument -- or any credible argument on oncology or
4 rheumatology or others.

5 BY MR. DALY:

6 Q. All right. So I just wanted to pick up on
7 something you said. In terms of oncology, you said I
8 don't believe it was as credible an or any credible
9 argument on oncology or rheumatology, is that what
10 you said?

11 A. I would say that there was not an
12 argument. There was on dialysis, dialysis had a
13 fairly good argument that their margins were
14 negligible in Medicare. And if you took away their
15 margins on drugs, that they had no margin on Medicare
16 patients unless it was added back in, dollar for
17 dollar. I do not think that was a credible argument
18 with oncology or rheumatology.

19 Q. In other words, oncology in your view
20 didn't have a dollar for dollar argument, but they
21 had an argument that they were underpaid some amount
22 on the service side of the equation, right?

1 the prices at which we purchase a drug and the
2 average wholesale price of the drug." Do you see
3 that language?

4 A. Yes.

5 Q. And do you have an understanding that that
6 is a correct statement?

7 MR. GOBENA: Objection to form.

8 THE WITNESS: Yes. I mean, I think the
9 issue is a matter of proportion. It's similar to the
10 oncologists, which is they clearly made money on the
11 spread and how much of that -- what measurement
12 appropriately should have been paid to deliver the
13 service, some portion of it. I don't know enough
14 about the nursing home issue here to know how much
15 there was. This is a small -- you know, nursing
16 homes are similar to home infusion, where they have
17 Part B Medicare patients in the home, and they
18 provide the service and they get paid for it.

19 So how much did they make on AWP spread
20 and how much of that would have measurably been put
21 back in if they had a more rational policy into a
22 servicing fee? I'm not sure, but my guess is much

1 like oncology, it probably wouldn't be all of it.

2 And I don't have all the facts to tell you that. I
3 mean, I did know on the dialysis side, it probably
4 was appropriate to put all of it back in. In many
5 other settings, it was not.

6 BY MR. DALY:

7 Q. I'm going to hand you what's been
8 previously marked as Exhibit Abbott 018, which
9 is testimony that was submitted at the hearing that
10 we've been talking about on October 3, 2002 that you
11 attended by the National Alliance for Infusion
12 Therapy and the National Home Infusion Association.
13 And do you recall the presentation that these
14 entities made at the hearing on 10-3-02?

15 A. No. I'm sure I wasn't there.

16 Q. Well, you were there for your part. This
17 is the same hearing you were at.

18 A. I traditionally left as soon as I was
19 done.

20 Q. As soon as possible.

21 A. As did every other administrator.

22 Q. Now, did you ever have any meetings or